

Rekha

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.258 OF 2020

1. Manuel Rodrigues ... Petitioners.
(since deceased) through his heirs,
Petitioners No.2 to 14.

2. Meljko Henry Rodrigues
son of late Manuel Rodrigues,
major of age, in service and his wife;

3. Sabina Angela Rodrigues,
daughter of late Ricardo Alemao,
major of age, housewife

Both residents at House No. 70/2,
Emirose Chambers, Grande Vanelim,
Colva, Salcete, Goa.

4. Leticia Dhar,
daughter of late Manuel Rodrigues,
major of age, in service and her
husband;

5. Chandra Sekhar Dhar,
son of late Sachindra Chandra Dhar,
major of age, businessman,
through his duly constituted Attorney,
Sabina Angela Rodrigues, Petitioner
No.2 herein, authorized by virtue of the
Power of Attorney dated 15/06/2015
executed before Adv. Gour Chandra
Ghosal, Notary, Kolkata, Govt. of India,
bearing Registration No. 921/97 dated
16/06/2015.

Both residents at Prakash Apartment,
77/1, Abinash Banerjee Lane, Shibpur,
Howrah-711 104, Kolkata.

6. Nilda Serrao,

daughter of late Manuel Rodrigues,
major of age, housewife/in service and
her husband;

7. Jerry Serrao,
son of late Ildefonso Serrao,
major of age, businessman,
Both residents at Coppell Waddo,
Salcete, Goa.
8. Veena Rodrigues,
daughter of late Manuel Rodrigues,
major of age, housewife and her
husband;
9. Ferrol P. Rodrigues,
son of late Mathew Rodrigues,
major of age, in service, through his
duly constituted Attorney, his wife,
Veena Rodrigues, Petitioner No.7
herein, authorized by virtue of the
Power of Attorney dated 16/06/2015
executed before Adv. Jose Fulvio P.
Colaco, Notary, Salcete-Goa (India),
bearing Registration No. 20607 dated
20/06/2015.

Both residents at Xiro Vaddo,
Carmona, Salcete, Goa.

10. Mobimbo N. Rodrigues,
son of late Manuel Rodrigues,
major of age, self employed,
and his wife;
11. Avilta Rodrigues,
daughter of late Julius D'Souza,
major of age, housewife/in service,

Both residents at Flat No.103,
Narmada Paradise Building No.12,
Mira Road (E), District-Thane,
Pin-401 107, and both represented by

their duly constituted Attorney,
Sabina Angela Rodrigues, Petitioner
No.2 herein, authorized by virtue of
the Power of Attorney dated
17/06/2015 executed before Adv. A. N.
Pande, Notary, Mumbai & Thane,
Maharashtra, Govt. of India,
bearing Serial No.3925/2015
dated 17/06/2015

12. Veena Safira Rodrigues
daughter of late Manuel Rodrigues
and widow of late Godwin James
Rodrigues, major of age, in service,
major of age, in service, resident at
Copplle Waddo, Colva, Salcete, Goa.
13. Naina Silveira,
daughter of late Manuel Rodrigues,
wife of Oscar S. Silveira,
(since deceased) through her sole heir,
Petitioner No.14.
14. Emelia C. Silveira,
daughter of Olcar Silveira,
major of age, student,
resident of Borda, Margao-Goa.

Versus

1. Davidinha Rodrigues e Dias, ... Respondents.
widow of late Bossuet Reduzindo
Silvestre Dias, (since deceased) through
heirs, Respondents No.2 and 3.
2. Ivan Dias,
son of late Bossuet Reduzindo Silvestre
Dias, major of age, bachelor, in service;
3. Norman Blaise Dias,
son of late Bossuet Reduzindo Silvestre
Dias, divorcee, major of age, in service;

Both residents of House No. 86, Church
Ward, Carmona, Near Church, Salcete,
Goa.

Mr. Sudin Usgaonkar, Senior Advocate with Ms. Pooja Naik,
Advocate for the Petitioners.

Mr. V. A. Lawande with Mr. Parimal S. Redkar, Advocates for
Respondent No.2.

CORAM:	VALMIKI	SA
	MENEZES, J.	
RESERVED ON:	30 March, 2023	
PRONOUNCED	6th April, 2023	
ON:		

JUDGMENT :

1. This petition under Article 227 of the Constitution of India assails Judgment and Order dated 04.01.2019 passed by the learned District Judge-3, South-Goa at Margao passed in Misc. Civil Appeal No.99 of 2016, which dismissed the appeal of the petitioners. The impugned Judgment upholds Order dated 17.09.2016 passed by the Additional Civil Judge Senior Division at Margao in Portuguese Civil Misc. Application No.62/2016/I filed in Portuguese Civil Misc. Application No.80 of 2012 which dismissed the petitioners' application for seeking eviction of the respondents from the residential house and property. By the impugned Judgment and Order dated 04.01.2019 passed by the District Court, and Order dated 17.09.2016 passed by the Court of the Additional Civil Judge Senior Division at Margao, it has been held that the petitioners' second

execution application to recover possession of the property in question was not maintainable, in the facts of the case.

2. In reply to the petition, the respondents filed an affidavit dated 03.02.2022 opposing the admission of the petition. Since the question that arises for my determination is whether in the facts and circumstances of the case, a second Execution Application was maintainable at law.

3. Rule. With the consent of the parties rule made returnable forthwith. The petition is disposed of finally with the consent of the parties.

4. On the basis of the pleadings in the petition and record annexed to the affidavit in reply, the following facts are relevant for consideration in deciding this matter:-

(a) In an Inventory Proceeding No.87/2003/I(O)/Inventory Proceeding No.111/2003/I(N) (hereinafter referred to as “Inventory Proceeding”) of the late parents of the petitioners and respondents, one of the properties in their estate, known as “Temporalem Moina”, admeasuring 1125 square metres in survey No.7/5 of village Carmona, Salcete, Goa (hereinafter referred to as “suit property”) on which there stands a residential house admeasuring 175 square metres, came to be allotted to the petitioners, pursuant to an auction held in the Inventory Proceeding. The suit property which included the house was allotted in favour of the petitioners by a Final Chart of Partition of the estate dated 28.03.2012 passed in the Inventory Proceeding.

(b) The petitioners thereafter filed an execution proceeding in the Inventory Court seeking enforcement of the final chart of allotment/partition and requested the Inventory Court to execute its allotment dated 28.03.2012 by evicting the respondents and placing the petitioners in possession of the suit property; a Warrant of Possession dated 04.05.2015 issued by the Inventory Court came to be executed by the bailiff of the Inventory Court on 04.05.2015 itself, where on a compliance report was recorded by the bailiff of the Inventory Court setting out that he had used labourers to remove all the material existing in the suit house, without obstruction from the Judgment debtors/respondents and had fully executed the Warrant of Possession, by putting the suit property in possession of the petitioners, who then placed new locks on the door of the suit house. As a token of having received possession of the suit house on execution of the warrant, the petitioners signed on the compliance report, thus acknowledging that they had taken possession of the suit property. This possession is not disputed by the petitioners and has been clearly pleaded by the petitioners at paragraph nos. 2(i) to 2(l) of the present petition.

(c) The petitioners further claim that after taking possession of the suit property in execution of the Warrant of Possession, they used to visit the suit property, pluck coconuts therefrom and often stay in the house standing in the suit property.

It is the petitioners' case that on 25.01.2016, when he visited the suit property, he found the respondents occupying the residential house; thereafter the petitioners approached the police on 27.01.2016 to seek eviction of the respondents from the suit property, which again was refused by the police, holding the same to be a civil dispute. The petitioners thereafter filed a second execution application in the very same Inventory Proceeding which came to be numbered as Portuguese Civil Misc. Application No.62/2016/I in Portuguese Civil Misc. Application No.80 of 2012, seeking eviction of the respondents from the suit property claiming that they had illegally trespassed thereupon in violation of the earlier orders passed in the Inventory Proceeding, and consequently sought vacant possession of the suit property.

(d) The second execution application was opposed by the respondents, who raised various defences amongst which, a preliminary objection was raised as to the maintainability of the second execution application after the first execution application had been fully satisfied.

The Inventory Court, by the impugned Order dated 17.09.2016 dismissed the second execution application bearing Portuguese Civil Misc. Application No.62/2016/I, holding that possession of the suit property had been handed over to the petitioners under the first execution application, which was fully satisfied, and the second application was not maintainable as it

was passed on a new cause of action which was beyond the jurisdiction of the Inventory Court. The appeal to the District Court against Order dated 17.09.2016 was dismissed by the impugned Order dated 12.10.2016, upholding the findings of the Inventory Court that the second execution application, on the facts of the case, was not maintainable.

(e) There were further developments in the matter, which are required to be noted by this Court and have a bearing on arriving at a proper decision in this petition; aggrieved by the final allotment and chart of partition in the Inventory Proceeding, the respondents filed Regular Civil Suit No.21/2016/A before the Court of the Civil Judge Senior Division at Margao, seeking damages from the petitioners on the premise that the petitioners' had fraudulently obtained the final chart of partition/decreed in Inventory Proceeding No.87/2003/I(O)/Inventory Proceeding No.111/2003/I(N), as also fraudulently obtained possession of the suit property and house in the first execution application.

In that suit, the petitioners filed their written statement on 10.05.2016 and raised a counter claim therein, in which they sought eviction of the respondents from the suit house and consequential relief of a decree of permanent injunction against the respondents from interfering with the suit property and the suit house, on a cause of action pleaded in paragraph 12 of the counter claim wherein they have stated that they were dispossessed

of the suit house on 25.01.2016, i.e. to say the same date on which they filed the second execution application.

The relief claimed in the counter claim in Regular Civil Suit No. 21/2016/A is the same as the one sought in the second execution application i.e. for recovery of possession of the suit property and eviction of the respondents.

(f) The plaint in Regular Civil Suit No.21/2016/A came to be rejected by an Order dated 24.09.2018 which order of rejection under Order 7, Rule 11 of C.P.C. was challenged in appeal in Regular Civil Appeal No. 33/2018, which was dismissed as withdrawn by the District Court on 02.03.2021. Consequently, the claim of the respondents against the final chart of partition and allotment in Inventory Proceeding does not survive and what continues, and is pending disposal, is the petitioners' counter claim seeking eviction of the respondents.

5. Learned Senior Advocate Sudin Usgaonkar for the petitioners argues that the second execution application is maintainable, after having lost possession of the suit property, in the very same Inventory Proceeding, in terms of the provision of Article 840 of the Portuguese Civil Code, 1939, applicable to the State of Goa. It is his contention that the Inventory Court being a Civil Court, will always be vested with powers and jurisdiction to render justice according to law, equity and good conscience, and no exception can be made in that regard, as to the jurisdiction of the Inventory Court to do justice to the petitioners by enforcing its order of allotment of

the suit property to the petitioners. In that regard he relies upon Judgment of the Hon'ble Supreme Court in **M.V. Elisabeth and others Vs. Harwan Investment and Trading Pvt. Ltd.**¹ and **K.K. Velusamy Vs. N. Palanisamy**², reported in.

6. He further submits that the provisions of the Portuguese Civil Procedure Code (Codigo Procesal Civil, 1939)(Portuguese Civil Procedure Code) in so far as it applies to execution of the allotment in Inventory Proceedings are saved in terms of the Goa Daman and Diu (Administration) Act, No.1 of 1962 and that the provisions of Order 21 of the Civil Procedure Code, would not be applicable, when an allottee of a property in Inventory Proceeding seeks to execute the chart of allotment and obtain possession of an immovable property allotted to an heir. For this proposition he relies upon Judgment of a single Judge of the Bombay High Court **Zacarias Durate Dormingos Pereira Vs. Camilo Inacio Evaristo Pereira**³.

7. Learned Senior Counsel for the petitioners further submitted that even under the provisions of the Civil Procedure Code, 1908 (C.P.C.) any Civil Court could always resort to its inherent powers under section 151 to, in an appropriate case, issue suitable directions to police officials or other authorities to extend their assistance in the execution of decrees and orders of the Court or to implement an order of injunction passed by it. To buttress this submission, he relies upon a Judgment of the Full Bench of the

¹ 1993 Supp (2) SCC 433

² (2011) 11 Supreme Court Cases 275

³ AIR 1984 Bom. 295

Madras High Court in **Century Flour Mills Ltd. Vs. S. Suppiah and others**, (dated 11.03.1975 in C.M.P. No. 10347 of 1974) and of a single Judge of the Madras High Court in **N. Karpagam and 3 others Vs. P. Deivanaiammal @ Deivathal @ Deivathayee Ammal**, reported in 2003-2-L.W. 398 (Civil Revision Petition No.2318 of 2002) wherein it has been held that where the civil Court, finds therein disobedience of its order it can exercised its inherent powers under section 151 of C.P.C. to enforce order of temporary injunction under Order 39 C.P.C.

8. Learned Senior Counsel Shri. Usgaonkar further contends that though the second execution application does not make specific reference to any provision of the Portuguese Civil Procedure Code under which it was filed, the application seeks to invoke powers of the Executing Court under Article 840 of the Portuguese Civil Procedure Code, whereby effective delivery of possession can be given to the allottee of the property in Inventory Proceeding by an employee of the Court, and such application can be filed multiple times, until the allottee gets effective delivery of the immovable property on site. He submits that the trial Court has failed to exercise jurisdiction vested in it under the above provisions of the Portuguese Civil Procedure Code; In the alternative, he submits that, in terms of section 151 of C.P.C., to give effective possession of the allotted property, the Civil Court has jurisdiction and consequently, the impugned order rejected the petitioners' application of the second execution called for interference of this Court in its jurisdiction under Article 227 of the Constitution of India.

9. Per contra, it is the argument of Shri. Vishnuprasad Lawande for the respondent no.2 that a second execution application is not maintainable, either under the Portuguese Civil Procedure Code or under Order 21 C.P.C. Since, by the petitioners' own admission, the first execution proceeding has culminated in full satisfaction of the allotment done in the Inventory Proceeding, when on 04.05.2015, the petitioner was put in possession of the suit property with the residential house standing thereon. He submits that once the first execution proceeding has come to an end with the satisfaction of the decree in full, an executing Court has no jurisdiction to entertain the second execution proceeding to execute the very same allotment or decree, whether by an Inventory Court or by a civil Court, as that would constitute a wholly new cause of action, which at the most entitled the petitioner to file a fresh suit for eviction of the respondents.

10. It is further the submission of the respondent no.2 that in the present case, that after the petitioner was put in the possession of the suit property in pursuance of the first execution proceeding on 04.05.2015, in a suit filed by the respondents bearing Regular Civil Suit No.21/2016/A laying challenge to the allotment in the Inventory Proceeding on an allegation of fraud, the petitioners had filed a counter claim on 10.05.2016 seeking the relief of restoration of possession of the very same suit property, notwithstanding the pendency of the second execution application which was filed on 25.01.2016 when the petitioners claim to have been dispossessed. It is his contention that, notwithstanding the fact that the plaint of the respondents was rejected on 24.09.2018, the fact that the

counter claim of the petitioners for recovery of possession is still pending disposal, itself would demonstrate the conduct of the petitioners in trying to maintain two parallel proceedings for the same relief, disentitling the petitioners to a relief of second execution. It is the contention of learned Advocate Shri. Lawande for the respondent no.2 that, in terms of the Judgment of the Hon'ble Supreme Court in **Shew Bux Mohata and others Vs. Bengal Breweries Ltd and others**⁴, which was followed in the Judgment of the single Judge of the Karnataka High Court in **Mrs. Rosane Jerome D'souza Vs. Bhagvandas Gangaram Kamble**⁵, it is a well settled principle that when a decree of recovery of possession has been fully satisfied in the first execution proceeding by taking over possession of a property under the decree, a second execution proceeding would not lie, when the decree holder subsequently loses possession of the property and seeks its recovery for a second time.

11. I have heard the learned Counsel for the parties and considered the entire record of both, the first execution proceeding, the second execution proceeding and of Regular Civil Suit No. 21/2016/A.

12. It is clear from the facts of the present case that the first execution proceeding was filed on 14.09.2012, which execution was completed on 04.05.2015 under the bailiff's report of that date, executing Warrant of Possession issued by the Inventory Court and evicting the respondents from the suit property and from the suit house. The Warrant of Possession produced on record of this petition has the signature of the petitioner

⁴ AIR 1961 SC 137

⁵ LR 2005 KAR. 705

affixed on the warrant of execution in token of his being put in possession of the suit property and the suit house and in satisfaction of the allotment of the property to him.

It is the petitioners' own case in their second application for execution that the first execution proceeding was closed on 08.06.2015 after the Warrant of Possession was executed on 04.05.2015. The petitioners then state in their second execution application dated 22.04.2016 that they were dispossessed by the respondents on 25.01.2016, i.e. almost 7 months after being put in possession under the first execution proceeding.

After filing the second execution proceeding, the respondents filed Regular Civil Suit No.21/2016/A for a declaration that the chart of allotment in the Inventory Proceeding was obtained by fraud, in which the petitioner filed his written statement alongwith a counter claim on 10.05.2016, seeking therein, the eviction of the respondents from the suit property on a cause of action pleaded in paragraph 12 of the counter claim, on being dispossessed by the respondents on 25.01.2016, the same cause as pleaded in the second execution application. It is thus, clear that the petitioners have sought to maintain two parallel proceedings, the first being the second execution application for a recovery of possession of the suit property from the respondents and the second being a counter claim for eviction of the respondents from the suit house.

13. From the record it appears that the suit bearing Regular Civil Suit No. 21/2016/A of the respondents was rejected when the order dated

24.09.2018 under Order 7 Rule 11 of C.P.C., against which the respondents preferred an appeal to the District Court in Regular Civil Appeal No.33/2018 which was dismissed as withdrawn on 02.03.2021. Consequently, the order of rejection of the respondents' plaint in Regular Civil Suit No. 21/2016/A became final and it was only the petitioners' counter claim for eviction that has proceeded against the respondents and is pending adjudication before the civil Court at Margao.

14. It is in these set of facts, that the rival submission of the parties are required to be weighed to decide whether this Court would exercise its jurisdiction under Article 227 of the Constitution of India and interfere with the impugned orders.

15. There is no doubt that the civil Court is always vested with the powers under section 151 of C.P.C. to enforce its orders during the pendency of a suit, where there may be no other specific provision or power under the C.P.C. to do so. **M.V. Elisabeth (supra)** and **K.K. Velusamy (supra)** are two Judgments of the Hon'ble Supreme Court which support this proposition. However, both those Judgments recognize an inherent powers of a Court to enforce its own orders to administer justice to the claimant. However, the question before me in the facts stated hereinabove stand on a totally different footing. The present case is not one where the trial Court was called upon to exercise its inherent powers during the course of a suit, but was one where it was called upon to conduct a second execution proceeding after the first proceeding had culminated in full

satisfaction of the allotment of the suit property and possession of the same had been given to the petitioner.

16. In my opinion therefore, the general proposition that a civil Court can resort to inherent powers vested in it to do justice during the course of the suit would not apply to the facts of this case.

17. The two Judgments cited by the petitioner i.e. **Century Flour Mills Ltd. (supra)** and **N. Karpagam and 3 others (supra)** were cases where, a civil Court was called upon to enforce orders of temporary injunction passed under Order 39 of C.P.C. whilst a suit was still pending. In both those Judgments the Madras High Court has proceeded on a footing that a civil Court, through interim applications filed by the plaintiff could exercise inherent powers under section 151 C.P.C. where it felt that the powers under Order 39 C.P.C. do not provide adequate relief for enforcement of its order of temporary injunction.

In my considered opinion, both those Judgments deal with a situation of enforcement of an interim order of a Court during the course of a suit and not, whether an executing Court, which had fully executed its decree of possession, has jurisdiction to entertain the second execution application for the same relief.

18. I therefore hold that the ratio laid down in, **Century Flour Mills Ltd. (supra)** and **N. Karpagam and 3 others (supra)** will not be applicable to the facts of the present case.

19. Shew Bux Mohata and others (supra) cited by the respondents was a decision in appeal before the Supreme Court wherein the High Court had held that the decree having being earlier executed in full, a second execution application was incompetent and on that count, had dismissed the second execution application. As noted by the Hon'ble Supreme Court in paragraph 1 of the Judgment, that the question that arose before it was whether the decree had earlier being executed in full.

In that Judgment at paragraph 9, the Supreme Court concludes that the Nazir of the Court had delivered possession of the suit premises to the decree holders in the first execution proceeding, it then goes to hold as under:-

“20.It is not in dispute that if the decree was once executed against defendant 4 in full, then it cannot be executed over again regarding Premises No.27. In other words, if possession had been fully delivered to the decree holders in execution of the decree on October 1, 1948, the decree must have been wholly satisfied and nothing remains of it for enforcement by further execution. The decree was for khas possession and under Order 21, Rule 35, of this Code in execution of it possession of the property concerned had to be delivered to the decree holders, if necessary, by removing any person bound by the decree who refused to vacate the property. The records of the proceedings show that such possession was delivered. Defendant 4 was the party in possession and bound by the decree. With regard to Defendant 4, the order made on September 8, 1949, states, “Possession so far as regards the Bengal Breweries are concerned, delivered”. This is an order binding on the decree holders. It has not been said that this order was wrong nor any attempt made at any time to have it set aside or to challenge its correctness in any manner. The

same is the position with regard to the order of November 22, 1948, recording on the Nazir's return that possession had been delivered in terms of the writ.

21. The order of September 9, 1949, no doubt further states, "Ordered that the execution case be dismissed on part satisfaction". The words "part satisfaction" in this order, however clearly do not refer to part satisfaction as against Defendant 4, the Bengal Breweries, for the order expressly states, "possession so far as regards the Bengal Breweries are concerned, delivered". The decree had therefore been satisfied in full as against the Bengal Breweries Ltd. and consequently as regards Premises No.27 in its possession. Even the learned Subordinate Judge who held the execution maintainable found that "the decree holders had no doubt previously got possession". Notwithstanding this, the learned Subordinate Judge decided that the decree could still be executed as he took the view that at the hearing before the High Court on January 21, 1949, Defendant 4 "must have ignored the delivery of possession by the Naib Nazir and he cannot now be heard to say that the delivery of possession by the Naib Nazir was legal and valid".

22. It is true that the Nazir's return showed that Defendant 4 had not been bodily removed. But the same return also shows that it had not been so removed because of certain arrangement arrived at between it and the decree holders and as the decree holders had not required the removal of Defendant 4 from the premises. Now under Order 21, Rule 35 a person in possession and bound by the decree has to be removed only if necessary, that is to say, if necessary to give the decree holder the possession he is entitled to and asks for. It would not be necessary to remove the person in possession if the decree holder does not want such removal. It is open to the decree holder to accept delivery of possession under that rule without actual removal of the person in possession. If he does that, then he cannot later say that he has not been given that possession to which he was entitled under the law. This is

what happened in this case. The decree holders in the present case, of their own accepted delivery of possession with Defendant 4 remaining on the premises with their permission. They granted a receipt acknowledging full delivery of possession. They permitted the execution case to be dismissed on September 8, 1949, on the basis that full possession had been delivered to them by Defendant 4. The fact that they put their guards on the premises as mentioned in the Nazir's return would also show that they had obtained full possession. It was open to the decree holders to accept such possession. Having once done so, they are bound to the position that the decree has been fully executed, from which it follows that it cannot be executed any more. In the case of Maharaja Jagadish Nath Roy v. Nafar Chandra Parmanik an exactly similar thing had happened and it was held that the decree was not capable of further execution. It was there said at p.15,

“The case, therefore, seems to me to be one of those cases in which a decree holder having armed himself with a decree for khas possession executes that decree in the first instance by obtaining symbolical possession only with some ulterior object of his own, and thereafter subsequently and as a second instalment asks for khas possession. The question is whether such a course is permissible under the law. I am of opinion that it is not.”

20. What follows from a reading of **Shew Bux Mohata and others (supra)** is that when the executing Court, after examining the record, comes to a conclusion that in the first execution proceeding, a decree of possession has been fully satisfied by handing over possession to the decree holder, and such proceeding has been concluded in full satisfaction of the decree, a second execution proceeding for executing the very same decree for possession would not lie. This principle was followed by the Karnataka High Court **Mrs. Rosane Jerome D'souza (supra)** wherein, after holding

that possession of the suit property was delivered to the decree holder in the first execution application a second execution application would not lie. **Mrs. Rosane Jerome D'souza (supra)** has discussed this proposition in the following terms:-

10. In the light of the rival contentions, the points for consideration in this revision are as under:

1. Whether the Judgment Debtors have been dispossessed on 10.03.1995 at 2.00 p.m., in execution of the Judgment and Decree in O.S. No.291/1971 dated 02.01.1975?

2.If possession is delivered as above, whether a second application for delivery of possession in execution of a decree is maintainable?

3. Whether the Executing Court is justified in withdrawing/recalling the Order passed on I.A. No.VII, dated 31.07.1999, in exercise of its inherent power?

12. Regarding Point No.2:- In the case of Shew Bux Mohata and another vs Bengal Breweries Ltd., and others it is held that once possession has been delivered to the Decree holder and the Decree Holder accepting possession the decree has been fully satisfied and it cannot be executed again. The relevant portion reads as follows:-

“Under Order 21 Rule 35 a person in possession and bound by the decree has to be removed only if necessary, that is to say, if necessary to give the decree holder the possession he is entitled to and asks for. But it is open to the decree holder to accept delivery of possession under that rule without actual removal of the person in possession. If he does that, then he cannot later say that he has not been given that possession to which he was entitled under the law. Where the decree holders of their own accepted delivery of possession with defendant remaining on the premises with their permission,

and they granted a receipt acknowledging full delivery of possession, and permitted the execution case to be dismissed on the basis that full possession had been delivered to them by defendant, they are bound to the position that the decree has been fully executed and the decree cannot be executed any more.”

13. In the case of K. Ramalingam & others vs K.N. Krishna Reddi and another it is held that once possession has been legally delivered, a second application for delivery will not lie unless there has been no legal complete and effectual delivery of possession on the earlier occasion. It is further held that delivery of possession according to delivery Athakshi, amounts to actual possession and it can not be termed as paper delivery. The relevant portion reads as follows:-

“Once possession has been legally delivered, a second application for delivery will not lie, unless there has been no legal, complete and effectual delivery of possession on the earlier occasion. In the latter case a subsequent application will be maintainable. Such an application cannot be called a “second application”. But where only a paper delivery has been made it cannot be said that the decree has been executed unless the Court satisfies itself that actual physical delivery has been effected.”

14. In the case of President-Roshan Mosque vs Sharfunnissa this Court has held that even if the dispossession was a result of high handed action, the only remedy available to the party dispossessed is to file a suit for possession.

“9. Section 144 C.P.C. would come into play if as a result of the decree passed the party has taken possession of the property and if that decree has been subsequently varied or set aside or modified. The dispossession contemplated by Section 144 C.P.C. is dispossession by executing the process of the Court. Section 144 C.P.C. does not contemplate a case where the party has taken the law into his own hands and has brought about dispossession. If the party has acted high-

handedly out of Court and has taken possession, the only remedy available to the party dispossessed is to file a suit for possession. The question of restitution does not arise in such cases .”

15. In the case of Tavanappa Hambanna Sangani by LRS., & others vs Veerabhadrapa Tippanna this Court has held as follows:-

“It is not competent for the judgment debtor to challenge before the execution court that the delivery effected is only a paper delivery, where a decree entitling the decree holder to take delivery of actual possession is executed through process of Court and the decree holder accepts the delivery given to him by the bailiff.”

16. From the decisions referred above, it is clear that if the judgment debtors have taken possession of property illegally after decree holder was put in possession of the said property in execution of a decree, the remedy available to the decree holder is to again take possession in accordance with law. There cannot be a second execution when there is legal, complete and effectual delivery of the property on the earlier occasion. A restitution as provided under Section 144 of the Code of Civil Procedure, is also not permissible in law. I answer the second point accordingly.”

21. Applying the ratio of the above two Judgments to the facts of the present case, since the trial Court has specifically concluded in its order that the allotment/decreed was executed in the first execution application and possession of the property had been handed over to the petitioner, which finding was concurrently upheld in paragraph 9 of the Appellate’s Court order, holding that the petitioner himself has admitted that he had already executed the decree and taken vacant possession of the house from the judgment debtor, and that fresh cause does not arise for filing the second

execution application, I am of the view that the impugned Judgment/orders do not call for any interference in exercise of the powers under Article 227 of the Constitution of India.

22. The other contention of the petitioner is that under Article 840 of the Portuguese Civil Procedure Code the second execution application would not be barred, more so since the cause for filing the same is continuous. Article 840 of the Portuguese Civil Procedure Code translated from Portuguese to English reads as under:-

“If the depository finds difficulty in taking charge of the properties or had doubts over the object of the deposit, he may apply that one employee goes to the site of the location of the properties and makes him effective delivery at the site.

When the doors are closed or there is some resistance offered, the employee shall seek the assistance of local administrative authority of the parish and also police force. The doors shall be opened by breaking in the presence of local administrative authority with two witnesses and the report of the occurrence shall be made”.

23. Execution proceeding under the Portuguese Civil Procedure Code are to be found under Title III, from Article 801 to Article 921. Article 840 forms part of sub section III which deals with attachment of immovable properties; sub section III in turn forms part of section II which deals with attachment of properties which are subject matter of execution of a money decree being an asset of a debtor. A plain reading of the entire section II dealing with attachment of properties to be sold in execution of a money decree would reveal that Article 840 is primarily in aid of execution of a money decree by attachment of the debtor's property, and is not a power in

the nature of an execution of allotment of a property by recovery of its possession from a co-heir in Inventory Proceedings.

24. Even assuming for a moment that the argument of the petitioner, that Article 840 vests an Inventory Court with the power to recover possession of property allotted to the petitioner in execution, a plain reading of Article 840 will lead to the conclusion that multiple applications for execution of a decree for recovery of possession of a immovable property can be made, even though the first execution application was disposed off after full satisfaction of the allotment in the Inventory Proceeding.

25. Looking at the factual circumstances of the present case, it becomes all too clear that, having recovered possession of the suit property during the first execution application in full satisfaction of the decree, applying the proposition laid down by the Supreme Court in **Shew Bux Mohata and others (supra)** the second execution application was not maintainable. Even, going by the conduct of the petitioner of filing a counter claim and seeking eviction of the respondents on the basis of the allotment in the Inventory, itself, demonstrates that the petitioner had subjected himself to the jurisdiction of a Civil Court to recover possession of the allotted property. Having exercised this option, in my view, the conduct of the petitioner would clearly demonstrate that he had accepted that the allotment/decreed in the Inventory Proceeding had been fully satisfied in the first execution application through which he recovered possession of the suit property.

26. Under these circumstances no infirmity can be found in the orders of the Courts below and the second execution application has been rightly dismissed.

27. For all the reasons stated above, in my considered opinion, this is not a fit case for invoking this Court's jurisdiction under Article 227 of Constitution of India, and hence I dismiss the petition.

28. There shall be no order as to costs.

VALMIKI SA MENEZES, J.